United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Affidavit

~~75-1491~~

75-4191

To be argued by
JOHN M. O'CONNOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4191

FRANCISCO ANTONIO SUAREZ-CASTRO,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

THOMAS J. CAHILL,
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FRANCISCO ANTONIO SUAREZ-CASTRO,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

RESPONDENT'S BRIEF

Statement of the Issues

1. Whether the petitioner voluntarily and intelligently exchanged his claim that deportation would subject him to persecution for a grant of voluntary departure within one year.

2. Whether the Board of Immigration Appeals abused its discretion in refusing to reopen the deportation proceedings to permit petitioner to renew his previously settled claim for relief under section 243(h), political persecution.

Statement of the Case

Francisco Antonio Suarez-Castro petitions this Court for review of a final order, dated August 27, 1975, of the United States Department of Justice Board of Immigration Appeals. In that order, the Appeals Board

affirmed an order of an Immigration Judge dated June 11, 1975, which denied petitioner's motion to reopen his deportation proceedings. The denial of the motion to reopen leaves in force a decision of an Immigration Judge, dated October 29, 1973, ordering that "in lieu of an order of deportation the respondent [Suarez-Castro] be granted voluntary departure . . . on or before October 29, 1974, or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct." An extension was granted by the District Director to January 15, 1975, and by an application dated January 31, 1975, the petitioner informed the District Director of his intention to move to reopen. The District Director stayed petitioner's deportation pending the outcome of the motion to reopen.

Facts

The background facts of this case are well summarized in the decision of the Immigration Judge on the petitioner's motion to reopen:

> "The respondent [Suarez-Castro] is an alien, a native and citizen of the Dominican Republic who last entered the United States at New York, N.Y. on November 18, 1968 at which time he was admitted as a nonimmigrant visitor for pleasure, who was authorized to remain until March 17, 1969. He remained beyond that date without authority thereby becoming subject to deportation on the charge contained in the Order to Show Cause.
>
> "Deportation proceedings were begun by service of an Order to Show Cause on November 9, 1970. In such proceedings deportability was conceded but the respondent indicated his wish to apply for a stay of deportation under Section 243

(h) of the Immigration and Nationality Act because he believed he would be subject to persecu- if deported to the Dominican Republic. The facts in the matter [were] presented to the Department of State in 1972 and that Department expressed the opinion that no foundation had been laid for such a claim.

"At a separate part of the hearing calendar held on October 29, 1973 the respondent agreed not to pursue his claim under Section 243(h) of the Immigration and Nationality Act on condition that he be granted a period of one year within which to effect his voluntary departure from the United States. He was granted that initial period of one year and, in fact, was granted an extension of his time within which to depart until January 15, 1975. He has now submitted a new motion requesting an indefinite stay of deportation, presumably on the basis of Section 243(h) of the Act, although no specific claim is made under that Section of law. The District Director granted a stay pending action on the document which he characterizes as a motion and the application was presented to me as if it were a proper motion to reopen.

For the purposes of avoiding circuity of action I will consider it to be a motion although it does not appear to be in apppropriate form." Petitioner's Appendix, Exhibit 3, pp. 2a-3a.

A hearing on the underlying 243(h) application was held on February 18, 1971 at which time, petitioner presented testimony that he was involved in civil strife in the Dominican Republic in 1965. Petitioner's faction lost, and he was placed in detention for approximately four months. Petitioner presented a witness who testified in support of his claim that military people on the losing side

were in danger if they returned to the Dominican Republic. Petitioner had other witnesses present whose testimony, if heard, would have been similar. (T. 38).* With this one witness having been heard, and before the Immigration and Naturalization Service had an opportunity to present any evidence, the hearing was adjourned.

Upon the continuation of the hearing on October 29, 1973, the following colloquy occurred immediately after the petitioner was sworn:

> Immigration Judge: All right put your hand down. Now as I understand it, you had, counsel, some discussion with Mr. Gurock?
>
> Mr. Martinez: Yes, I have your Honor.
>
> Immigration Judge: . . . and rather than pursue this application for a 243(h) any further, Mr. Gurock has in behalf of the Government offered Voluntary Departure within a period of a year and you've agreed to take that time, is that correct?
>
> Mr. Martinez: It is true your Honor.

Shortly thereafter the following colloquy occurred between the Immigration Judge and Mr. Suarez-Castro:

Immigration Judge to respondent:

> Q. All right Mr. Suarez, the Government and your Attorney have agreed that I'm going to give you Voluntary Departure within a period of a year. Do you understand that? A. Yes.
>
> Q. Well, I'm giving you this because you are saving the Government the cost and the expense

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* "T" refers to the Transcript of Deportation Proceedings.

and the trouble of making a final adjudication on your claim of Political Asylum. Do you understand that? A. Yes.

Q. What is means is that you will have to leave within that year's period and take your chances on getting a visa together with your wife on the basis of your wife's status. So you understand that? A. Yes, I understand.

Q. Now if you don't leave, then you will be deported to Dominican Republic. Do you understand that also? A. Yes.

Q. All right I shall sign an order giving you until October 29, 1974 to leave at your own expense. Do you understand? A. Yes.

Immigration Judge: Final Order gentlemen?

Mr. Martinez: Final order your Honor.

Mr. Levine: Final Order.

Immigration Judge: Case is close. (T. 44-45).

The Immigration Judge signed the order referred to and petitioner was to leave by October 29, 1974. He received an extension to January 15, 1975. By the same attorney, petitioner then filed a Form I-589 "Request for Asylum in the United States", dated January 31, 1975. By letter dated March 17, 1975 the District Director advised petitioner that since "this Service, in 1972, considered and denied a request for political asylum, no further steps will be taken on the request." Appendix, Exh. 8. At the Director's suggestion, petitioner requested that the Director consider the Form I-589 as a motion to reopen the section 243(h) proceedings and tendered the $25.00 fee. Appendix, Exh. 6.

By an application dated April 14, 1975, petitioner then submitted an "Application For Stay of Deportation".

As a reason for requesting the stay of deportation, petitioner briefly outlined the background information with regard to the civil strife in the Dominican Republic. The only information divulged with regard to the period following petitioner's hearing was as follows:

> "Mr. Suarez is presently processing an immigrant visa at St. John, Newfoundland based on his marriage to Teofila Suarez a Legal Permanent Resident of the United States." Appendix, Exh. 7, p. 3.

Although not in appropriate form, the application was presented to the Immigration Judge and considered by him as a motion to reopen the deportation proceedings with regard to the 243(h) claim. The Immigration Judge denied the motion to reopen stating that petitioner's attorney had made a deliberate choice to withdraw the previous 243(h) claim and that the motion to reopen contained no relevant information showing that circumstances had changed since the petitioner entered into the stipulation to withdraw the claim. Appendix, Exh. 3, pp. 2-3. Petitioner appealed this decision to the Board of Immigration Appeals which agreed with the Immigration Judge and dismissed the appeal. Appendix, Exh. 1.

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. § 1253—

* * * * *

> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

Relevant Regulations

Title 8, Code of Federal Regulations (C.F.R.) § 242.17

242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation. * * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

Title 8, Code of Federal Regulations (C.F.R.):

§ 3.2. *Reopening or reconsideration.* The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. . . . Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless

the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * * § 3.8. *Motion to reopen or motion to reconsider* (a) *Form* * * * Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. * * *

General Legal Background

Section 243(h) of the Act, 8 U.S.C. § 1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.* *Muscardin* v. *Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *United States ex rel. Dolenz* v. *Shaughnessy*, 306 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. § 242.17(c); *Chen* v. *Foley*, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. *Cheng Kai Fu* v. *Immigration and Naturalization*

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* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Imgration Appeals, 8 C.F.R. 3.1.

Service, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). See also *Hyppolite* v. *Immigration and Naturalization Service*, 382 F.2d 98 (7th Cir. 1967); *Lena* v. *Immigration and Naturalization Service*, 379 F.2d 536 (7th Cir. 1967).

In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. *Muscardin* v. *Immigration and Naturalization Service, supra; Zupicich* v. *Esperdy*, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Vardjan* v. *Esperdy*, 197 F. Supp. 931 (S.D. N.Y. 1961), *aff'd.*, 303 F.2d 279 (2d Cir. 1962).

In the present case, the petitioner interruped the hearing on his claim of political persecution to stipulate that, in return for a grant of voluntary departure within one year, he would forego a determination as to whether he had met his burden of persuading the Immigration Judge that he personally would be subject to persecution in the Dominican Republic in 1973 on account of his participation in the political-military events in 1965. Accordingly, the issue presently before the court is whether the Attorney General has abused his discretion in holding the petitioner to his stipulation and in refusing to reopen the proceedings relating to petitioner's claim of political persecution. See *Li Cheung* v. *Esperdy*, 377 F.2d 819 (2d Cir. 1967); *Kladis* v. *Immigration and Naturalization Service*, 343 F.2d 515 (7th Cir. 1965).

POINT I

The petitioner voluntarily and intelligently exchanged his claim that deportation would subject him to persecution, for the grant of voluntary departure within one year.

Virtually in the middle of his 1973 hearing on the merits of his application to withhold deportation because of his allegation that he would be subject to persecution, the petitioner stipulated that he would forego his right to the completion of the hearing in return for a period of one year in which to depart the country voluntarily. Now that his year is up he contends that he should not be held to this agreement. He claims that he "was led to believe that sufficient time would be given to process his case, the terms of the order, one year voluntary departure notwithstanding." Pet. Br., p. 3.

The simple answer to the petitioner's contention is that the record of the hearing belies it. Petitioner was specifically questioned with regard to his understanding of the practical ramifications of his stipulation. The Immigration Judge asked Mr. Suarez-Castro if he understood "that you will have to leave within that one year's period and take your chances on getting a visa together with your wife on the basis of your wife's status." (T 45). Mr. Suarez-Castro answered that he understood that he was taking this chance on getting a visa from the Dominican Republic, and that he also understood the Judge's explanation that "if you don't leave, then you will be deported to the Dominican Republic." (T 45). Thus, petitioner fully understood and desired that he be allowed one year voluntary departure and that beyond that year he would be deported. Also, the expectation, fully set out on the record, was that petitioner would seek a visa from the Dominican Republic. While he is free to pursue other avenues, his present claim that he

does not wish to seek a visa from the Dominican Republic is no reason to set aside the stipulation.

The record also clearly contradicts petitioner's claim that the 1973 hearing did not result in a "*final* administrative determination." Pet. Br., p. 3, emphasis in original. The last words of the Immigration Judge were, "Final Order Gentlemen", to which petitioner's present counsel Mr. Martinez responded, "Final order your honor." The record makes clear that the understanding of the parties was that the stipulation finally disposed of petitioner's claim under Section 243(h). This final determination was based on the stipulation, not upon an evaluation of the evidence. In fact, it is precisely the lack of a final evaluation of the evidence of the claim that impelled the petitioner to compromise his claim. Since the ruling could have gone against him, he exchanged the uncertainty of the ruling for the certainty of the one year extension with voluntary departure. The legal result is that the petitioner cannot now make the same claim that was already finally disposed of on the basis of his stipulation. If this could be done, there would be little, if any, point to the Service's entering such stipuations in the first place. Whether this legal result is termed *res judicata*, the term the plaintiff uses, or accord and satisfaction, or direct estoppel, or waiver is of relatively minor analytical importance. Whatever the label, the result is the same; the petitioner is barred by his voluntary stipulation from making the same claim on which he could have had an evidentiary determination if he had proceeded with the hearing. Having himself foreclosed the possibility of such an evidentiary determination, the petitioner may not now complain that he was denied due process of law on this ground. See generally *Cartier* v. *Secretary of State*, 506 F.2d 191, 196 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975); *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 513 (1953) ("appellant cannot blow hot and cold" with regard to

administrative action; "if the appellant then had taken the position it seeks now" it might not have been successful in obtaining the benefits that accrued to it in the previous proceeding.)

If, following the final order of the Immigration Judge, the petitioner wished to reopen his 243(h) application, he would have, at the very least, to set out in his supporting papers a sufficient showing that circumstances had changed significantly since the final disposition of his claim.

POINT II

The Board of Immigration Appeals did not abuse its discretionary authority in declining to reopen the deportation proceeding to permit petitioner to renew his previously settled claim for relief under Section 243(h).

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,* has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 3.2, provides in pertinent part that motions to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and not available and could not have been discovered at the prior hearing." Additionally, 8 C.F.R. § 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material."

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* Section 103(a) of the Act, 8 U.S.C. § 1103(a).

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be previously unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. When such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding.

In the present case, the motion to reopen, even when viewed in its most favorable light, is not sufficient. All of the information and circumstances brought forth in the motion to repoen were previously brought forth on the initial application for relief under section 243(h). As pointed out by the Immigration Judge, the petitioner should, at the very least, make a showing in his moving papers that conditions have materially worsened since the time of his stipulation. Whatver the condtions were in the Dominican Republic in 1973, even in the petitioner's view they were not so serious as to deter him from entering into the stipulation to voluntarily return there within one year.

Where, as here, the alien was afforded an opportunity to apply for discretionary relief, was fully aware of this opportunity and right, and yet waived a decision on such application, the regulations specifically state that a "motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief" "shall not be granted" "unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing." 8 C.F.R. § 3.2, order of phrases transposed.

Nevertheless, none of the papers submitted in support of the petitioner's motion to reopen the proceedings gives

any indication of a worsening of conditions, or of any other material evidence that was not available or discoverable at the prior hearing. The only information furnished by petitioner with regard to events unknown at the prior hearing is that he is now seeking a visa through Newfoundland.* While the petitioner is entitled to due process, procedure must eventually come to an end. If the Board reopened proceedings on a showing as flimsy as that in the instant case there would never be an end to deportation proceedings. At the end of each proceeding would be a motion to reopen and another proceeding. There is no reasonable basis for reopening the petitioner's hearing, and the motion and appeal seem clearly for the purposes of further delay of the petitioner's departure.

Since the grant or denial of a motion to reopen is discretionary (*Novinc* v. *Immigration and Naturalization Service*, 371 F.2d 272 (2d Cir. 1967), the scope of judicial review is extremely narrow. *Muscardin* v. *Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *Zupicich* v. *Esperdy*, 319 F.2d 773 (2d Cir. 1963). Where, as here, the evidence offered would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. *Cheng Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

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* However, there are evidently other subsequent events, not mentioned by petitioner which tend to undercut his claim of current persecution. His former wife has returned to the Dominican Republic, apparently without ill fortune (see Appendix, Exhibit 5), although there was a claim made at the hearing that she too would be in danger. (T. 39-40)

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for Respondent.

JOHN M. O'CONNOR,
Of Counsel.

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te of New York)
nty of New York) ss

Pauline P. Troia, being duly sworn,
oses and says that she is employed in the Office of the
ted States Attorney for the Southern District of New York.

That on the
2
day of March, 19 76 she served ~~x~~ copy of the
hin govt's brief

placing the same in a properly postpaid franked envelope
ressed:

Antonio C. Martinez, Esqs.,
324 West 14th St.
New York, NY 10014

And deponent further
s s he sealed the said envelope and placed the same in the
l chute drop for mailing in the United States Courthouse Annex,
St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

orn to before me this
st day of March, 19 76

Lawrence Mason

LAWRENCE MASON
ary Public, State of New York
No. 03-2572560
Qualified in Bronx County
mission Expires March 30, 1977